In the Supreme Court of the State of Alaska

Peter Chamberlain, Appellant, v. **Dr. Javid Kamali, M.D.,** **Providence Hospital,** Appellees.	Supreme Court No. **S-13123** **Order** Staying Trial Court Order Date of Order: **5/30/2008**

Trial Court Case # **3AN-08-07509 CI**

The motion for stay pending appeal filed in this court on 5/29/08 is **GRANTED**. Accordingly, the temporary restraining order entered by the superior court on 5/20/08 shall remain in effect until further order of this court.

In considering whether to grant the motion for stay, a "balance of hardships approach" has been followed by this court. Under this approach if the "questions presented by an application" for relief are "grave, and the injury to the moving party will be certain and irreparable" if the party's application is denied, and the opposing party's injury will be "inconsiderable" if the application is granted, a stay will "usually be granted."[1] Accordingly, if the balance of hardships "tips decidedly toward plaintiff" then "it will ordinarily be enough" that the moving party has "raised questions going to the merits" that are "serious [and] substantial."[2]

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[1] *A.J. Indus. Inc. v. Alaska Pub. Servs. Comm'n*, 470 P.2d 537, 540 (Alaska 1970) (quoting *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929)).

[2] *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 260 F.2d 738, 740 (2d Cir. 1953)).

In this case, the plaintiffs have indicated, and Providence does not seriously dispute, that extubation of Mari Chamberlain will result in her death in minutes or days. Such a harm is both certain and irreparable. Providence has repeatedly asserted that the care for Mari is medically ineffective (i.e., that it does her no good). It has also, in its oral argument, averred that continuing to care for Mari would violate its ethical standards. While such harms are not negligible, they do not weigh too heavily against the clear harm that Peter and Mari Chamberlain would suffer should this court deny the stay.

Further, Peter Chamberlain has raised serious and substantial questions as to whether the superior court's decision disqualifying him from serving as Mari Chamberlain's surrogate is legally or factually justified. The superior court determined that Peter Chamberlain was not "reasonably available" as a surrogate because he was not competent to make decisions on Mari Chamberlain's behalf. The superior court reads "reasonably available" to mean capable of making a reasonable or reasoned decision, but this interpretation may go beyond the normal meaning of the term "reasonably available." The statutory structure supplies a remedy for unreasonable decision making by a surrogate.[3] This, in turn, may indicate that under the statute the designated relationship between surrogate and ward is more important than the surrogate's ability to make objectively reasonable decisions for the ward.

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[3] Under AS 13.52.060(f) a health care provider may decline to follow the instructions of a surrogate if doing so requires health care that "according to reasonable medical judgment cannot cure the patient's illness, cannot diminish its progressive course, and cannot effectively alleviate severe discomfort and distress." *See also* AS 13.52.030(h). Whether the care advocated by Peter Chamberlain is unreasonable in this sense is the ultimate question in this case.

Further assuming that the court was correct that "reasonably available" encompasses a competence standard there appear to be serious questions as to whether Peter Chamberlain should have been disqualified. Alaska Statute 13.52.030(h) states that a surrogate should properly consider the "wishes, values, and best interests of the patient." Peter Chamberlain's past behavior demonstrated that he could not properly take care of Mari Chamberlain but that does not necessarily mean that he could not make decisions based on her wishes and values. Peter Chamberlain testified at the hearing that he and Mari Chamberlain had discussed her views on life and life support and at this stage at least there is little reason to think that Peter's views on these matters differ from those of Mari. A Michigan Appeals Court has indicated that if a surrogate is to be disqualified there must be clear and convincing evidence that the surrogate is incompetent to make the critical medical decision at issue.[4] There is a serious question as to whether the evidence satisfies this standard.

IT IS SO ORDERED.

Entered by direction of an individual justice.

Clerk of the Appellate Courts

Cheryl Jones, Deputy Clerk

cc: Judge Morse
Trial Court Appeals Clerk/Anchorage

[4] *See In re A.M.B*, 640 N.W.2d 262, 295 (Mich. App. 2001).

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